

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TINA MARIE DIXON (MAYFIELD))	
Claimant)	
VS.)	
)	Docket No. 165,613
IBP, INC.)	
Respondent)	
Self-Insured)	

ORDER

Respondent requested Appeals Board review of then Assistant Director Brad E. Avery's Award upon Remand dated October 14, 1997. The Appeals Board heard oral argument by telephone conference. Jeffrey K. Cooper was appointed Appeals Board Member Pro Tem to serve in place of Appeals Board Member Gary M. Korte who recused himself from this proceeding.

APPEARANCES

Claimant appeared by her attorney, Diane F. Barger of Wichita, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, Tina M. Sabag of Dakota City, Nebraska. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations contained in the Award.

ISSUES

The original Award was entered in this case by Special Administrative Law Judge Douglas F. Martin on June 17, 1996. The Special Administrative Law Judge denied claimant's request for compensation finding claimant failed to prove that her injuries were related to her work. Claimant appealed this decision to the Appeals Board. In an Order dated May 21, 1997, the Appeals Board reversed and found claimant had proved she sustained a work-related back injury but had not proved a work-related right upper extremity injury. The Appeals Board remanded the case to the Special Administrative Law for findings on the remaining issues resulting from claimant's work-related low-back injury.

The then Assistant Director Brad E. Avery entered the Award upon Remand which is the subject of this appeal. The respondent appeals the Assistant Director's Award entitling the claimant to a 43 percent work disability.

Respondent contends claimant's permanent disability is related to her pre-existing degenerative disc disease and not her employment. Furthermore, if claimant is entitled to permanent partial disability benefits, such benefits are limited to her permanent functional impairment because claimant failed to even attempt an accommodated job offered by the respondent within claimant's permanent restrictions. Respondent also contends claimant's pre-injury average weekly wage should be calculated on a five-day work week instead of a six-day work week as found by the Assistant Director.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

It is not necessary to repeat the findings of fact and conclusions of law as set forth in its Order dated May 21, 1997. Those findings and conclusions are adopted as if specifically set forth in this Order.

Average Weekly Wage

The Assistant Director found claimant's testimony established that she was expected to be available to work on Saturday. Therefore, the Assistant Director found, citing the holding in Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), that claimant's pre-injury average weekly wage should be calculated on a six-day work week instead of a five-day work week. This resulted in an average weekly wage finding of \$335.92.

The Appeals Board finds the claimant has failed to prove she was expected to work a six-day work week. The only wage statement entered into the record indicates claimant only worked overtime during three weeks out of an eleven-week period and one of those weeks indicated claimant only worked one-half an hour of overtime. Claimant testified, if she worked Saturday, she would then have Sunday and Monday off as her weekend. Therefore, the Appeals Board finds the wage statement admitted into evidence coupled with the claimant's testimony that if she worked on Saturday then she had Monday off, established that she was not regularly expected to work a six-day work week. Therefore, the Appeals Board finds the wage statement admitted into evidence proves the claimant was earning \$6.50 per hour working 40 hours per week or \$260 plus overtime and other pay of \$23.92 per week for an average weekly wage in the amount of \$283.92.

Nature and Extent of Disability

Two physicians testified in this case in regard to claimant's permanent functional impairment and permanent work restrictions. John J. Wertzberger, M.D., an orthopedic surgeon in Lawrence, Kansas, at the request of claimant's attorney, examined claimant on February 26, 1993. The Administrative Law Judge appointed P. Brent Koprivica, M.D., of Lenexa, Kansas, to perform an independent medical examination of claimant. Dr. Koprivica saw claimant on March 31, 1995.

Based on claimant's testimony and the testimony of those two physicians, the Appeals Board found in its May 21, 1997, Order that the record supported the conclusion that claimant's job duties permanently aggravated her pre-existing degenerative disc condition.

The respondent contends, at the time claimant was released for light duty by treating physician Dr. Edward Prostic on September 9, 1992, claimant refused to even attempt to perform the offered accommodated work which would have paid a comparable wage. Therefore, the respondent argues the policy considerations as announced in Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), apply and a comparable wage should be imputed to claimant limiting claimant to an award of permanent partial disability benefits based upon only function impairment.

Claimant testified she returned to work both in July and September of 1992, but on both occasions, she reported her back symptoms became so severe she was unable to even attempt the work. Finally, after the September 1992 incident, she voluntarily quit. She remained under Dr. Prostic care until January 4, 1993, when he released her with permanent restrictions. There is no evidence in the record that respondent offered

claimant an accommodated job either in July or September of 1992. There also is no evidence in the record that respondent offered claimant a job within her permanent restrictions after Dr. Prostic released claimant on January 4, 1993. Accordingly, the Appeals Board finds the policy considerations announced in Foulk do not apply to the facts in this case because there is no evidence claimant unreasonably refused to even attempt an accommodated job offered by the respondent within her permanent restrictions. Therefore, the Appeals Board finds the claimant is entitled to a work disability.

The applicable definition of work disability in effect on claimant's April 29, 1992 accident date was contained in K.S.A. 1991 Supp. 44-510e(a) as follows:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation

Two vocational experts testified in regard to claimant's loss of ability to perform work in open labor market and to earn comparable wages. Mr. Bud Langston testified on behalf of the claimant and Mr. Daniel Fisher testified on behalf of the respondent. Both vocational experts, post-injury, placed claimant into the sedentary to light physical exertion categories as defined by the Department of Labor's Dictionary of Occupational Titles. In formulating their occupational disability opinions, Mr. Langston considered testifying physician Dr. Wertzberger's permanent restrictions and Mr. Fisher considered testifying physician Dr. Koprivica's permanent restrictions.

Respondent contends those physicians' permanent restrictions were based on injuries to both claimant's back and her right upper extremity. Consequently, the respondent argues both vocational experts' opinions are invalid because the Appeals Board found in its previous Order that claimant had failed to prove she had sustained a right upper extremity work-related injury. However, the Appeals Board finds both Dr. Wertzberger's and Dr. Koprivica's permanent restrictions were based only on claimant's low-back injury. Dr. Koprivica specifically indicated that his restrictions were consistent with claimant's exacerbated degenerative disc disease. At the time Dr. Wertzberger examined the claimant on February 26, 1993, he had not given a permanent functional impairment rating in regard to claimant's right upper extremity injury. He did not give such an opinion until his deposition was taken on May 17, 1995. Additionally, Dr. Wertzberger's restrictions, as stated in his report of February 28, 1993, that limited claimant to a 20 pound weight lifting restriction at the waist and limited repetitive bending

to less than 12 times per hour, relate only to claimant's low-back injury and not her right upper extremity injury.

Both vocational experts, in addition to claimant's post-injury permanent restrictions, took into consideration claimant's education, training, and job experience in formulating their opinions. This also included a 36-week office technology program claimant completed at the Topeka Technology College after her injury.

The Appeals Board finds both vocational expert opinions have been attacked for various reasons by both the claimant and respondent. However, the Appeals Board finds both credible, and there is no reason to give more weight to one opinion over the other. Therefore, equal weight will be given to both experts' opinions on claimant's loss of ability to perform work in the open labor market and to earn comparable wages. Mr. Langston opined that post-injury claimant had a 65 - 70 percent loss of ability to perform work in the open labor market and retained the ability to work full time and earn \$5.75 per hour. Mr. Fisher opined that claimant had a 39.5 percent loss of ability to work in the open labor market and retained the ability to work full time and earn \$6.50 per hour. Utilizing claimant's pre-injury average weekly wage of \$283.92 per week, Mr. Langston's wage loss opinion is 19 percent and Mr. Fisher's wage loss opinion is 8 percent. This results in a 43 percent work disability per Mr. Langston and a 24 percent work disability per Mr. Fisher. Giving both vocational experts' opinions equal weight, the Appeals Board finds claimant is entitled to a work disability in the amount of 34 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that then Assistant Director Brad E. Avery's Award dated October 14, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Tina Marie Dixon (Mayfield) and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred April 29, 1992, and based upon an average weekly wage of \$283.92.

Claimant is entitled to 78 weeks of temporary total disability compensation at the rate of \$189.29 per week or \$14,764.62, followed by 337 weeks of permanent partial disability compensation at the rate of \$64.36 per week or \$21,689.32 for a 34% permanent partial general disability, making a total award of \$36,453.94.

As of December 31, 1998, there is due and owing claimant 78 weeks of temporary total disability compensation at the rate of \$189.29 per week or \$14,764.62, followed by 270.29 weeks of permanent partial compensation at the rate of \$64.36 per week in the sum of \$17,395.86 for a total of \$32,160.48, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$4,293.46 is to be paid for 66.71 weeks at the rate of \$64.36 per week, until fully paid or further order of the Director.

Claimant is entitled to unauthorized medical expenses up to the applicable statutory limit upon proper presentation of the statement for the expense.

Claimant is entitled to future medical care upon application and approval of the director.

The respondent is ordered to pay all authorized medical expenses.

All remaining orders of the Assistant Director, contained in the Award, are approved and adopted by the Appeals Board as if specifically set forth herein.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
Jennifer Daniels, Dakota City, NE
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director